COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

BARNSTABLE, ss DOCKET NO: SJC-08464

COMMONWEALTH,
Appellee

v.

CHARLES ROBINSON,
Defendant/Appellant

BRIEF OF DEFENDANT/APPELLANT CHARLES ROBINSON ON APPEAL FROM HIS CONVICTION PURSUANT TO MASS. GEN. L. CH. 278, §33E

JOSEPH F. KROWSKI, ESQUIRE
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BBO: 280540

Dated: November 28, 2018

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STATEMENT OF PROCEEDINGS

The Defendant, Charles Robinson ("Robinson"), was indicted with murder and assault and battery with a dangerous weapon stemming from the shooting death of Edward Figueroa ("Figueroa") on February 24, 2000, at 75 Union Wharf Road in Dennis. (R.A. 21)[1].

Trial began on August 14, 2000. Robinson moved for a required finding of not guilty at the conclusion of the commonwealth's case-in-chief. (Tr. 5-782-84)[2]. He renewed it at the close of evidence. (Tr. 5-887).

Jury deliberations began August 21, 2000, at 11:55 a.m. (Tr.6-973). They returned guilty verdicts at 2:10 p.m. (Tr. 6-974). The jury found Robinson

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[1] Reference to the Record Appendix will appear (R.A. pg.#).

[2] Reference to the trial transcript will appear (Tr. Vol.-pg. #).

guilty of first degree murder on deliberate premeditation and extreme atrocity and cruelty. (Tr. 6-975). Robinson received the mandatory life sentence. (Tr. 6-977). The assault and battery dangerous weapon conviction was placed on file. (Tr. 6-678).

Robinson's appeal has been stayed approximately eighteen years to pursue a Motion for New Trial. Litigation has been complicated by Robinson's competency. On May 23, 2018, the Single Justice ordered Robinson's direct appeal to proceed with his Motion for New Trial to follow its own course.

STATEMENT OF FACTS

I. TESTIMONY AND EVIDENCE

On February 24, 2000, Figueroa was living with his girlfriend, Leticia Rose ("Rose"), at 75 Union Wharf in Dennis. (Tr. 2-173-174). Robinson and Figueroa were good friends. (Tr. 2-187; Tr. 4-723). Robinson had been staying with Figueroa and Rose at their apartment. (Tr. 2-187). Rose never observed any difficulty between the two men. (Tr. 2-188).

Rose got home at 6:00 p.m. on February 24th. (Tr. 2-142). She parked her car next to Robison's Lexus. (Tr. 2-142, 143). Rose entered the apartment and went to her bedroom. (Tr. 2-143). Figueroa then entered the

bedroom and changed into clothing Rose purchased for him before coming home. (Tr. 2-143).

Rose next entered the living room where she spoke to Robinson. (Tr. 2-144). He was wearing dark clothes. (Tr. 2-185). Robinson thanked Rose for letting him stay at her house and for stealing some time with Figueroa to "find out where his head was at." (Tr. 2-144). Rose returned to her bedroom as Robinson and Figueroa talked in the living room. (Tr. 2-185-86).

Rose got in the shower at 7:25 p.m. (Tr. 2-148). Before doing so, she heard Figueroa's brother, Juan "Sisco" Serano ("Serano"), enter the apartment. (Tr. 2-193). Serano arrived with Jennifer Kimball ("Kimball"). (Tr. 2-221; Tr. 2-215; Tr. 4-172). Serano gave Figueroa money owed for a past marijuana purchase. (Tr. 4-712-13). Figueroa introduced Robinson. (Tr. 2-218; Tr. 4-713). There was no tension between Robinson and Figueroa. (Tr. 2-218). Serano left before Rose finished her shower. (Tr. 2-193).

After her shower, Rose overheard Robinson tell Figueroa he needed to get his car on the road. (Tr. 2-149-151). Robinson also said that he should slap Figueroa's face or punch him in the mouth. (Tr. 2-153). Figueroa said, "sorry, dog," and "I didn't mean

to offend you." (Tr. 2-152). Their conversation did not cause Rose any concern. (Tr. 2-192). Rose left the apartment sometime after 9:00 p.m. (Tr. 2-157). She did not see Robinson with a gun. (Tr. 2-198).

Charles Ross ("Ross") lived in the apartment above Rose and Figueroa. (Tr. 2-224). He heard six shots coming from the downstairs apartment. (Tr. 2-224, 229, 230 246). He first testified he heard the shots at 9:30, then he said 10:15, and then he said he was unsure. (Tr. 2-225, 229).

Following the noises, Ross's mother came into his bedroom. (Tr. 2-230). She opened their apartment's door to go check on things. (Tr. 2-231). After a brief argument with Ross, she closed the door and looked out Ross's bedroom window. (Tr. 2-236, 248). The window provided a view of the parking lot. (Tr. 2-249). She did not see any cars outside. (Tr. 2-237).

Ross was familiar with Robinson's Lexus. (Tr. 2-239). Ross had last it parked in the lot at approximately 8:00 p.m. (Tr. 2-240, 242). He could hear cars as they entered and exited the lot. He heard no vehicles that night. (Tr. 2-250).

Rhonda McMahon ("McMahon") lived across the hall from Rose's apartment. (Tr. 2-264). At approximately

10:15 p.m., she heard loud bangs from Rose's apartment. (Tr. 2-265). Similar to Ross, she heard no vehicles nor did she observe Robinson's car present in the parking lot. (Tr. 2-266, 273).

Marie McGowan ("McGowan"), lived across the street at 72 Union Wharf. (Tr. 2-254). She heard a car traveling unusually fast on Union Wharf Road at approximately 10:10 p.m. (Tr. 2-255-56). She could not describe or identify the car. (Tr. 2-259).

Rose returned after 10:30 p.m. (Tr. 2-159). Robinson's car was not in the parking lot. (Tr. 2-159). She saw Figueroa dead on the floor. (Tr. 2-161). He was seated on an arm chair tipped over on its back. (Tr. 2-161, 164). His hands were on his lap and his head was partially under a little telephone end-table. (Tr. 2-164, 196). Rose manipulated Figueroa's body before dialing 911. (Tr. 2-162).

Figueroa suffered gunshot wounds to his head, upper chest, left arm, right hand, and left lower leg. (Tr. 4-579-80). Blood was under Figueroa's head and shoulder area. (Tr. 3-359). Blood spatter suggested Figueroa was on his back on the ground when he was shot in the head by a shooter positioned to Figueroa's left. (Tr. 3-545, 552, 565). The gun was likely

between six inches and three feet from Figueroa's head when the shot was fired. (Tr. 4-566, 570). Five .38 caliber projectiles were recovered from Figueroa's body. (Tr. 4-579, 588). Figueroa's time of death was consistent with 10:15 p.m. (Tr. 4-591, 593).

The commonwealth presented cellphone records that on February 24th at 11:29 p.m. Robinson's cellphone connected with a Mattapoisett cell tower one in New Bedford (Tr. 4-696; Tr. 5-755). Another call placed at 11:32 p.m., originated and ended utilizing a New Bedford cell tower. (Tr. 4-698). The commonwealth presented no cellphone records showing Robinson in Dennis or Union Wharf at the suspected time of Figueroa's shooting.

The 11:29 p.m. call was to Robinson's mother, Pauline Robinson ("Pauline"). (Tr. 5-848). Nothing was out of the ordinary about Robinson's tone or demeanor. (Tr. 5-849). The 11:32 p.m. call was to Melissa Marchesiani ("Marchesiani"). (Tr. 4-673, 675). She had been with Robinson for eleven years and had three children with him. (Tr. 4-672). There was nothing out of the ordinary about the call and nothing unusual about his tone. (Tr. 4-678).

Robinson arrived at his girlfriend Shalonda

Brantley's ("Brantley's") house at 228 Haffards St., Fall River, on February 24th sometime late in the evening. (Tr. 3-460-61). He parked his Lexus on the road. He was either talking on his cellphone or finishing a call when he arrived. (Tr. 3-461, 3-468-69). Robinson was wearing a black cap, black jacket, black jeans and black boots, which is what Rose had seen Robinson wearing before she left 75 Union Wharf. (Tr. 3-500). Robinson stayed the night. (Tr. 3-476).

Brantley first told the police Robinson arrived at 8:00 p.m., but stated Robinson told her to say that time. (Tr. 4-462-63, 466, 479, 484, 486). Fall River Officer Bruce Tavares ("Tavares") travelled to Haffards St. at 12:05 a.m. on Friday, February 25th, and did not see Robinson's Lexus. (Tr. 3-528). However, Andrade Abrude ("Abrude"), who also lived at 228 Haffards St., recalled Robinson's vehicle on the road at approximately 7:30 or 8:00 p.m. (Tr. 5-833, 834, 836).

The following morning, February 25th, Pauline called Robinson at Brantley's apartment. She explained the police had been to her house. They stated someone was shot and wanted to know if Robinson was all right. (Tr. 3-477-78; Tr. 5-854). Robinson told Pauline he

was fine. He did not know about anyone being shot. (Tr. 5-854).

Trooper Burke called Pauline later in the afternoon. (Tr. 5-855). He wanted to speak with Robinson. (Tr. 5-855). Pauline called Robinson and told him to go to the police station. (Tr. 5-849, 856). Robinson asked Brantley to drive him to the police station, which she did. (Tr. 3-466, 484, 500).

No forensic evidence connected Robinson to Figueroa's shooting. Fingerprints recovered from the scene were compared with Robinson's prints with negative results. (Tr. 4-634). Robinson's clothing was seized on February 25, 2000. (Tr. 5-765). It was his same clothing from February 24th. (Tr. 2-219). None of Figueroa's blood, observable or non-visible occult blood, was found on Robinson's clothing despite the fact that back spatter would have projected in a conical fashion from Figueroa's wounds. (Tr. 3-547; Tr. 4-603, 607, 614; Tr. 5-759).

Robinson's Lexus was examined for blood, trace evidence, ammunition, and firearms. (Tr. 3-359, 374). No visible or occult blood was found. (Tr. 4-604, 608). Brantley's Fall River residence was searched. (Tr. 3-367). No evidence of any kind was seized

connecting Robinson to Figueroa's shooting. (Tr. 3-368; Tr. 4-612-13).

In the absence of direct or forensic evidence, the commonwealth introduced character evidence against Robinson. Brantley testified that Robinson sold marijuana from 228 Haffards St. (Tr. 3-490, 499). Michael Ellis ("Ellis") drove Figueroa to Fall River to pick up drugs a week or two before he died. (Tr. 2-301, 303). Figueroa entered a building and later exited accompanied by Robinson. (Tr. 3-304). Robinson approached Ellis's vehicle and made eye-contact. (Tr. 2-305). When Figueroa returned to Ellis's car, he gave him marijuana. (Tr. 2-306).

Daniel Lent ("Lent") drove Figueroa to Fall River on February 19, 2000. (Tr. 4-644, 648). They met Robinson who let them into the residence. (Tr. 4-651, 653). Figueroa gave Robinson money who handed Figueroa marijuana. (Tr. 4-657). Lent saw Robinson with a gun. It was a revolver on a clip at his waist. (Tr. 4-657, 658, 659).

Lent claimed Brantley was present on February 19th. (Tr. 4-655). Brantley had no memory of it. (Tr. 3-488). Brantley had never seen Robinson in possession of a gun. (Tr. 3-487-88, 498). Lent admitted he did

not tell the police about Robinson's alleged gun until five weeks after he first spoke with them. (Tr. 4-665). He also previously told the police the last time he drove Figueroa to Fall River was in mid-January, 2000, not February 19th. (Tr. 4-663).

As of March 28, 2000, Robinson was held at the Barnstable House of Correction. (Tr. 4-725). On that date, Robinson's cellmate, Frank Garcia ("Garcia"), requested a transfer to William Campbell's ("Campbell's") cell. (Tr. 4-729, 736). Garcia was transferred. (Tr. 4-726).

Following Garcia's transfer, Robinson approached Garcia and had an argument. (Tr. 4-732). Robinson told Garcia he was going to kill him. (Tr. 4-733). Garcia responded that Robinson did not have a gun. (Tr. 4-733). According to Garcia, Robinson replied, "that's what the other guy thought." (Tr. 4-733). Campbell claimed Robinson said, "Mr. Figueroa didn't think that either." (Tr. 4-739).

The defense called a number of inmates who overheard the argument- David Pasquarelli ("Pasquarelli"), Anthony Pina ("Pina"), and Jonathan Williams ("Williams"). Pasquarelli heard Robinson make no such statement. (Tr. 5-816). Neither did Pina.

(Tr. 5-817-823). Williams was firm; Robinson made no statement about shooting anyone. (Tr. 5-828).

Evidence pointed to one or more third-party culprits. Figueroa sold marijuana from the Union Wharf apartment. (Tr. 2-175). Figueroa had access to Rose's apartment when she was at work. (Tr. 2-180). Consequently, Rose did not know all the people Figueroa would let in to sell drugs. (Tr. 2-175, 177).

Of nine or ten fingerprints lifted from the scene, two were matched to Figueroa. (Tr. 3-363-64; Tr. 4-635). None of the remaining prints matched Robinson. (Tr. 4-634). Seven prints of sufficient value to make an identification remained but no identification was made. (Tr. 4-636). These unidentified prints included one found on the kitchen door and another on the storm door, which would be used to enter the apartment. (Tr. 4-638).

Ryan Ferguson ("Ferguson") had motive, means, and opportunity to kill Figueroa. In February, 2000, Ferguson was living with his girlfriend, Leah Moore ("Moore"), at 29 Center Street in Dennisport. (Tr. 3-381). On February 23rd, Moore was home with Ferguson. (Tr. 3-382-83). At approximately 5 or 6:00 p.m., Figueroa and Robinson stopped at Moore's house for

approximately fifteen minutes to one half hour. (Tr. 3-384, 429). Moore had a brief conversation with Figueroa and Robinson before they left. (Tr. 3-384).

At 8:00 or 9:00 p.m., Moore received a call from Figueroa who passed the phone to Robinson. (Tr. 3-384-85). Robinson told Moore he wanted to date her. (Tr. 3-385). Moore told Ferguson about the telephone call, which made him upset. (Tr. 3-388, 503).

Robinson and Figueroa returned to Moore's apartment around the time Moore and Ferguson had retired to their bedroom. (Tr. -388, 389, 430). Ferguson got out of bed and encountered Robinson in the kitchen. (Tr. 3-390, 402). Robinson said, "What's up" to Ferguson who responded in kind. (Tr. 3-511).

Figueroa attacked Ferguson with closed fists to the left side of his head. (Tr. 3-390, 404, 511). The attack progressed into the hallway and into Moore's bedroom. (Tr. 3-390, 512). Ferguson was not fighting back. (Tr. 3-406). Figueroa stood over Ferguson, who was down on the bed, as he continued to punch Ferguson on his back and sides. (Tr. 3-406).

Robinson was not involved in the fight. (Tr. 3-391). Robinson was saying, "Come on, Eddie. Chill out. Let's go. Let's get out of here." (Tr. 3-512).

Robinson removed Figueroa from Ferguson. (Tr. 3-512). Robinson then told Ferguson he was lucky it was Figueroa he fought with. (Tr. 3-523).

Ferguson was upset after the fight. (Tr. 3-392, 431). Ferguson told Moore, "This is war. He (Figueroa) hits like a bitch." (Tr. 3-410-11). Ferguson made the same statement to Serano who was also present. (Tr. 4-721). Ferguson called his good friend Columbus Mario "Rio" Jones ("Jones") and asked for an "SK," a type of AK-47 assault rifle. (Tr. 3-505, 516). Ferguson believed Jones could produce the weapon because Jones had talked about it. (Tr. 3-513).

On February 24th, Moore drove Ferguson and Jones to the Huntsman Motel. (Tr. 3-414). Maritza Samano ("Samano"), the mother of Ferguson's child, was living there. (Tr. 3-393, 434). Moore arrived at the Huntsman with Ferguson and Jones at approximately 8:00 p.m. (Tr. 3-393, 435, 508). Ferguson and Jones entered Samano's room. (Tr. 3-415, 437). Samano told Jones to leave. (Tr. 3-437, 508). Jones left and Ferguson stayed. (Tr. 3-438, 508). Samano claimed Ferguson stayed the night with her. (Tr. 3-444).

The Huntsman Motel was located less than a mile from 75 Union Wharf. (Tr. 3-414; Tr. 5-791). One could

walk the distance. (Tr. 3-414). In fact, it was a shorter walk than a drive, depending on the path a person took. (Tr. 5-761).

Moore picked up Ferguson at the Huntsman on the morning of February 25th. (Tr. 3-396) He was wearing the same clothes as the night before. (Tr. 3-419). At her apartment, Moore received a call from Figueroa's sister, Sonia. (Tr. 3-396, 398). Sonia asked to speak with Serano. (Tr. 3-397). Moore handed Serano the phone. (Tr. 3-397).

Sonia came to Moore's apartment and told Serano that Figueroa was dead. (Tr. 4-715). Sonia and Serano left. (Tr. 3-398). A half hour later, Serano called and asked to speak with Ferguson. (Tr. 3-398, 519). Serano, concerned about Ferguson's threats, asked him if he shot Figueroa. (Tr. 3-521; Tr. 4-716)[3]. Ferguson denied it. (Tr. 3-521). He said it was "just coincidental." (Tr. 4-716).

The police learned of Ferguson on February 29th. (Tr. 5-762). They wanted to speak with Ferguson, but he was "on the run." (Tr. 3-423). Ferguson was interviewed on March 7, 2000, with his attorney. (Tr.

[3] Ferguson said the conversation was over the telephone. (Tr. 3-399). Serano testified it was in person. (Tr. 4-716, 722).

5-762-63). The police began the interview by assuring him he was not a suspect. (Tr. 5-763).

Ferguson was assured he was not a suspect despite the fact that police had his fingerprints on file since December, 1999, yet they were not compared to the unidentified prints lifted from the scene. (Tr. 4-639). His clothing was never forensically tested for the presence of non-visible, occult blood. (Tr. 4-605, 606). He was told he was not a suspect, even though he lied to the police about the reason why he called Jones. (Tr. 3-515, 517).

II. JURY ISSUES

Juror 2-7, advised at empanelment she was a "rank conservative." (Tr. 1-27). She assured she could be fair and impartial. (Tr. 1-27). She was chosen as a juror. (Tr. 1-27, 36).

At the beginning of the third day of trial, the Trial Judge advised that Juror 2-7 expressed the following to a court officer:

> She has now expressed to the court officers that this (conservative) bias is eating away at her; that people are given an opportunity in life, and some people choose not to take it; and they pursue a certain course of action in their life, and they—they get whatever it is they deserve by pursuing that course of action. (Tr. 3-320).

The Trial Judge questioned Juror 2-7 alone in chambers. (Tr. 3-320-21). A stenographer was present who read the *voir dire* to the parties. (Tr. 3-321, 330). Defense counsel did not object. (Tr. 3-321).

Juror 2-7 advised she was growing angry at some of the witnesses. (Tr. 3-323). She was having difficulty setting aside her biases. (Tr. 3-323). On three occasions the Judge questioned if she could set aside her feelings and consider the case impartially. (Tr. 3-323, 324, 325). She could not give a straight answer concluding, "It's definitely difficult to answer in the affirmative or negative." (Tr. 3-327).

The Trial Judge asked Juror 2-7 whether she shared her thoughts with other jurors. (Tr. 3-327). She said yes, she shared her thoughts about education in general. (Tr. 3-328). She told another juror what she thought a witness's tattoo meant. (Tr. 3-328). She also spoke with members of the panel about her feelings, as an educator, about people not taking advantage of opportunities given to them. (Tr. 3-328). She advised that two other jurors were teachers with whom she mentioned the decline of student values, morals, and parental care. (Tr. 3-328).

The Trial Judge returned to the courtroom

whereupon the *voir dire* was read. (Tr. 3-330). Both the prosecutor and defense counsel raised concern about what Juror 2-7 said to the other jurors. (Tr. 3-332, 333). Defense Counsel advised he was troubled by the juror's

> inability to follow your instructions not to discuss the case, even though she didn't—she equivocated on that. But secondly, has any of that to the extent she set aside your ruling and talked, has any of the poison got out into our panel now, which causes me the greatest concern. (Tr. 3-333).

The Trial Judge responded, "It really doesn't concern me." (Tr. 3-333). He excused the juror and conducted no *voir dire* of the remaining jurors to determine what was discussed and whether each one remained indifferent. (Tr. 3-333-35). Defense counsel reiterated his objection that, "the poison may have gone beyond one person." (Tr. 3-337). The Trial Judge responded, "I won't go any further with that. I will save your rights." (Tr. 3-337).

At the conclusion of the third day, the Trial Judge, before adjourning, said the following to the Jury, granting license for premature discussions:

> Some information has come to me that the jury was discussing the matter. Again, I think it's very important—**not essential (emphasis added)**, but very important that you do not. Wait until you have heard the

entire case. (Tr. 3-554).

After adjourning, the Trial Judge addressed a third juror issue in Chambers. (Tr. 3-555-58). Juror 1-5's son was in the House of Correction where Ferguson was incarcerated. (Tr. 3-556). She was concerned that Ferguson would "get to her son." (Tr. 3-556). The Judge advised he instructed the court officer to assure her that there would be no problems and asked the court officer to notify the House of Correction of the situation. (Tr. 3-556). The Trial Judge stated, "she did not indicate that this would in any way affect her ability to be a juror." He conducted no *voir dire* of her. (Tr. 3-557).

The Trial Judge advised, "I don't necessarily disclose every single thing that comes to me. But I thought this was important enough to share with you and put on the record." (Tr. 3-557). The Trial Judge's comment begged the question what other jury issues occurred during the course of trial that were not shared with Counsel.

SUMMARY ARGUMENT

The commonwealth presented insufficient evidence identifying Robinson as the shooter. No eyewitness identified Robinson, no forensic evidence established

a connection between Robinson and Figueroa's death, and the circumstantial evidence left his guilt to conjecture and surmise. See Commonwealth v. Mazza, 399 Mass. 395 (1987). Therefore, Robinson is entitled to an acquittal as a matter of law. See Commonwealth v. Latimore, 378 Mass. 671 (1979). **(pgs. 20-31).**

Second, Robinson must receive a new trial because the Trial Court erroneously handled jury issues on the third day of trial. Jurors 2-7 was questioned in chambers in the defendant's absence about her bias. The Judge excused the juror, but, despite defense counsel's urging, conducted no *voir dire* of the remaining jurors to assess their continued impartiality. Also, the Court made a statement granting license to the jurors to engage in premature discussions. Lastly, the Court failed to conduct a *voir dire* of Juror 1-5 who brought an issue to the Judge's attention after court adjourned. The errors created a structural defect and met the standard of prejudice for a new trial. See Commonwealth v. Angiulo, 415 Mass. 502, 530 (1993); United States v. Resko, 3 F.3d 684 (3rd Cir. 1993). **(pgs. 31-40).**

Third, Robinson was denied a fair trial by the admission, over the defendant's objection, of evidence

of Robinson's preceding drug transactions with Figueroa. See Commonwealth v. Anestal, 463 Mass. 655, 664 (2012). The evidence was irrelevant and prejudicial to Robinson's trial rights. See Commonwealth v. Helfant, 398 Mass. 214, 224-25 (1986). The evidence only proved Robinson's bad character and propensity to commit the crime. See Id. **(pgs. 40-45).**

Fourth, the prosecutor, highlighting the defendant's bad character, made arguments during closing that were not supported by the evidence. See Commonwealth v. Howard, 469 Mass. 721 (2014). He argued Figueroa was a bodyguard and a drug dealer for Robinson from whom he regularly restocked his marijuana supply. The prosecutor's theory found no record support. Robinson was denied due process for which a new trial is required. See Id. **(pgs. 45-48).**

Finally, Robinson is entitled to relief upon the SJC's plenary review of the record pursuant to Mass. Gen. L. ch. 278, §33E. **(pgs. 48-49).**

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF ROBINSON'S GUILT BEYOND A REASONABLE DOUBT

Robinson's motion for a required finding of not guilty made when the commonwealth rested should have

insufficient evidence of Robinson's guilt. The Due Process Clause of the Fourteenth Amendment and Article Twelve of the Massachusetts Declaration of Rights guard against conviction except upon proof beyond a reasonable doubt of every essential element of the crime. In re Winship, 397 U.S. 358, 364 (1970); Commonwealth v. Salemme, 395 Mass. 594, 602 (1985).

When reviewing a denial of a motion for a requiring finding of not guilty, the Court considers whether the evidence reasonably supported a finding of guilt beyond a reasonable doubt. Latimore, 378 Mass. at 677. "It is not enough for the appellate court to find that there was some record evidence, however slight, to support each essential element of the offense." Id. at 677-78. Rather, the court must determine whether the evidence was sufficient, in the light most favorable to the prosecution, to permit a rational fact-finder to find each element beyond a reasonable doubt. Id. at 676-77; Jackson v. Virginia, 443 U.S. 307, 318-19 (1979).

A conviction may rest on inferences drawn from circumstantial evidence. Brown v. Commonwealth, 407 Mass. 84, 85-6 (1990). However, a conviction cannot be based on inferences piled atop inferences. Mazza,

399 Mass. at 399. Inferences drawn from the facts must be reasonable and possible, but need not be necessary or inescapable. Commonwealth v. Mangum, 357 Mass. 76, 86 (1970). If guilt is left to conjecture or surmise with no solid foundation in fact, a conviction cannot stand. Commonwealth v. Curtis, 318 Mass. 584, 585 (1945); Commonwealth v. Fancy, 349 Mass. 196, 200 (1965).

In Robinson's case, the commonwealth introduced evidence of Robinson's behavior before and after Figueroa's shooting, but his identification as the shooter was left to speculation. Therefore, his convictions must be vacated. The correctness of this proposition is clear when Robinson's case is compared and contrasted with relevant precedent.

In Curtis, the SJC reversed the defendant's murder conviction because the evidence was insufficient to identify him as the killer. Curtis, 318 Mass. at 587. The defendant lived close to the decedent, within approximately four hundred feet; was friends with him; and had intimate knowledge of his habits and financial affairs. Id. at 586. The defendant was the first to discover the decedent's body on his kitchen floor. Id. There was no evidence

that the defendant had changed his clothes, and there was no blood on his unchanged clothes. Id. There was no evidence linking the defendant to any potential murder weapon. Id.

In Commonwealth v. Martino, 412 Mass. 267 (1992), on the day of her death, the decedent phoned the defendant and asked him to perform repairs on her home. Martino, 412 Mass. at 270. The defendant arrived later in the day before leaving for a bar. Id. The decedent's body was discovered in the home's basement the following morning. Id. She died by strangulation. Id. at 271.

The SJC found the evidence sufficient to support the defendant's murder conviction. Id. at 272. The defendant acknowledged being present at the decedent's estimated time of death. Id. Inferences from the circumstantial evidence supported the guilty verdict. There was a sheet of paper under the decedent's knee with the defendant's shoe print on one side and his handwriting on the other. Id. at 270. A pile of wood was near the decedent's body and splinters were recovered from the defendant's clothing. Id. at 270-71. An inculpatory note written by the defendant was found in his van. Id. at 271. Rope near her body was

similar to rope found at the defendant's home. Id. A hair in the decedent's mouth was similar to the defendant's hair. Id.

In Mazza, the defendant placed a call to the decedent from a friend's house expressing concern that a woman they each dated was going to commit suicide. Mazza, 399 Mass. at 396 & n. 1. The defendant next asked his friend for a ride to a hotel in Dorchester. Id. at 396. The friend's vehicle needed gas, so the friend and the defendant drove to a gas station located adjacent to the hotel. Id. While the friend was pumping gas, the defendant walked to the hotel's parking lot. Id. He returned within a minute and a half and told his friend, "there's a problem." Id. They drove back to the friend's house. The decedent's dead body, shot twice, was discovered in his vehicle in the hotel lot. Id.

The defendant had a motive to kill the decedent. Id. at 397. Evidence placed the defendant in the parking lot around the time the decedent's body was found. Id. at 399. There was evidence of the defendant's consciousness of guilt. Id. at 397. He was apparently burning his clothing on the day the decedent was killed. Id. He shaved his mustache, dyed

his hair, fled to Vermont, and stopped using his nickname. Id. at 398.

The SJC overturned to the defendant's conviction. Evidence of motive and consciousness of guilt were not a substitute for proof of identification. Id. at 400. Although the defendant left his friend while he was pumping gas, he was calm and composed when he returned. Id.at 399. It was pure speculation what the defendant did during the time he was not with his friend at the gas station. Id. at 400.

The medical examiner could not establish the decedent's time of death; therefore, there was no evidence that the decedent was killed when the defendant was present. Id. at 399. No forensic evidence connected the defendant to the killing. Id. at 398. There was no evidence the defendant had a gun on the day the decedent's body was found. Id. at 398.

In Salemme, the decedent was shot in the head by a bullet traveling right to left. Salemme, 395 Mass. at 597. The decedent was observed ten (10) minutes prior to his death seated between the defendant to his right and a third person to his left. Id. at 599. Following the decedent's death, the defendant could not be found at his residence or his usual spots. Id.

at 598. The defendant eventually surrendered to police approximately a year and a half following the decedent's death. Id.

The SJC overturned the defendant's conviction. No rational jury could conclude that the defendant, as opposed to the third person seated to the decedent's left, fired the shot. Id. at 599. There was no evidence that the men remained in their seated positions for the full ten (10) minutes prior to the decedent's death. Id. Also, it was equally plausible that had the men remained stationary, the decedent could have turned his head and been shot on the right by the person to his left. Id. The defendant's guilt was therefore left to conjecture and surmise. Id. Placing the defendant with the decedent at the time of his death coupled with consciousness of guilt did not support the defendant's conviction. Id. at 601.

In Robinson's case, the commonwealth's evidence did not place Robinson with Figueroa at or near the time of his death. See Mazza, 399 Mass. at 399. Unlike the defendant in Martino, Robinson did not acknowledge being present. See Martino, 412 Mass. at 272. Robinson was last seen with Figueroa by Rose in the apartment at 9:00 p.m., approximately one hour and

fifteen minutes prior to Figueroa's shooting, which Ross and McMahon placed at approximately 10:15 p.m. (Tr. 2-157, 225, 264). Similar to the defendant in Salemme, the commonwealth offered no evidence that Robinson and Figueroa remained together in the same position and location for the subsequent hour and fifteen minutes. See Salemme, 395 Mass. at 599.

No eyewitness saw Robinson with Figueroa at the time of his death. Neither Ross, his mother, nor McMahon saw or heard Robinson or his vehicle at the time of the shooting or departing immediately after. (Tr. 2-237, 250, 266, 273). McGowan heard a vehicle speeding away, but she did not identify it as Robinson's Lexus. (Tr. 2-255, 256, 259).

It was left to conjecture and surmise that Robinson was even the last person to see Figueroa alive. Figueroa sold marijuana from the apartment to people Rose did not know. (2-175, 177). Fingerprints of sufficient quality were obtained from the exterior of the kitchen door and its storm door that one would use to access the apartment from outside. (Tr. 4-638). The prints were not identified, suggesting an unidentified person may have entered the apartment.

No circumstantial or forensic evidence linked

Robinson to Figueroa's killing. Robinson's cellphone records suggested Robinson was in the area of Mattapoisett traveling towards New Bedford at 11:29 p.m., more than an hour after the shooting. (Tr. 4-696; Tr. 5-755). However, no cellphone records placed Robinson in Dennis generally or Union Wharf specifically at 10:15 p.m. Consistent with the defendant in Mazza, Robinson's tone and demeanor were not unusual or out of the ordinary during the calls. (Tr. 4-678). See Mazza, 399 Mass. at 399.

Similar to the defendants in Curtis and Mazza, there was no evidence that Robinson possessed a gun at the time the decedent was shot. See Curtis, 318 Mass. at 587; Mazza, 399 Mass. at 398. Lent testified he saw Robinson with a revolver five days before Figueroa's death, but no witness placed a weapon in Robinson's hand on February 24th. (Tr. 4-657, 658, 659). Neither Serano nor Kimball said they saw Robinson with a gun when they visited Figueroa on the 24th. Rose did not see Robinson with a gun when she left at 9:00 p.m. (Tr. 2-198). No gun was recovered from his Lexus or Brantley's apartment. Contrast with Martino, 412 Mass. at 271 (similar rope to strangle decedent found in defendant's home).

There was no evidence that Robinson was wearing different clothing on February 25th when he surrendered to the police than he was wearing on February 24th. (Tr. 2-185, 219; Tr. 3-500). Similar to the Defendant in Curtis, Robinson's clothing and boots were examined for visible and non-visible blood with negative results. See Curtis, 318 Mass. at 586. (Tr. 4-603, 607, 614). This is particularly significant given back spatter would have projected from the decedent's wounds in a conical shape towards the shooter who was positioned above Figueroa to his left with a firearm between three feet and six inches of Figueroa. (Tr. 3-545, 547, 565; Tr. 4-566, 570; Tr. 5-759).

Robinson's Lexus was examined forensically for blood and trace evidence which yielded no results connecting Robinson to the shooting. (Tr. 3-359, 374). Brantley's Haffards St. apartment was also searched. (Tr. 3-367). No blood or trace evidence was seized connecting Robinson to the scene. (Tr. 3-368; Tr. 4-612-13). This is dissimilar from the defendant in Martino, for whom inculpatory evidence was found in his van and residence. See Martino, 412 Mass. at 271.

Similar to Salemme, in which there was third party culprit evidence, there was evidence of

Ferguson's potential responsibility for Figueroa's death. See Salemme, 395 Mass. at 599. Ferguson had a motive based on the fight the preceding night. Ferguson voiced an intent to harm Figueroa and requested Jones provide him with an assault rifle. (Tr. 3-505, 516). Ferguson had an opportunity having been dropped off at 8:00 p.m. at the Huntsman Motel located within walking distance of Figueroa's apartment. (Tr. 3-414). Ferguson showed consciousness of guilt. He was "on the run" after Figueroa's death, would not talk to police until assured he was not a suspect, and still lied during questioning. (Tr. 3-423, 515, 517; Tr. 5-763).

Robinson's conviction rests on evidence that he was overheard arguing with Figueroa more than one hour before Figueroa was shot coupled with evidence of consciousness of guilt—telling Brantley he was at her apartment at 8:00 p.m. on February 24th and the contested comment made to Garcia while incarcerated. Evidence of motive, opportunity, and consciousness of guilt together are not substitutes for proof of identification beyond a reasonable doubt. Mazza, 399 Mass. at 400; Salemme, 395 Mass. at 600. Robinson's guilt was therefore left to conjecture and surmise.

See Curtis, 318 Mass. at 585. His conviction must be set aside and a finding of not guilty enter.

II. THE TRIAL COURT COMMITTED ERROR IN HANDLING JURY ISSUES ON THE THIRD DAY OF TRIAL.

A. THE COURT IMPROPERLY HANDLED ISSUES REGARDING JUROR 2-7 AND 1-5

The Trial Judge should have included Robinson and Defense Counsel when he questioned Juror 2-7. He also should have questioned the remaining jurors about the extent Juror 2-7 communicated her biases and, if so, whether each remained impartial.

When a judge conducts an inquiry regarding alleged juror misconduct, there is a constitutional requirement, derived from the right of confrontation and due process, that the defendant and counsel be present. Angiulo, 415 Mass. at 530 (1993); Martino, 412 Mass. at 286. It is error to exclude a defendant from a *voir dire* when a juror's impartiality is discussed. Angiulo, 415 Mass. at 531.

If the defendant objects to his exclusion, a new trial will be required if the commonwealth cannot demonstrate that the error was harmless beyond a reasonable doubt. Commonwealth v. Owens, 414 Mass. 595, 603 (1993). If a defendant charged with murder does not object, the error is reviewed for a

substantial risk of a miscarriage of justice pursuant to Mass. Gen. L. ch. 278, §33E. Commonwealth v. Dyer, 460 Mass. 728, 735 n. 7 (2011). The standard is similar to, but more favorable than, the standard for a claim of ineffective assistance of counsel. Commonwealth v. Wright, 411 Mass. 678, 682 (1992). The Court finds a substantial risk of a miscarriage of justice if not substantially confident that the verdict would have been the same irrespective of the error. Commonwealth v. Ruddock, 428 Mass. 288, 292 n. 3 (1998).

In Angiulo, under ch. 278, §33E review, the SJC reversed the defendant's conviction because of the Trial Judge's improper, yet un-objected to, handling of a jury issue. See Angiulo, 415 Mass. 502. Members of an anonymously empaneled jury reported they felt intimidated by the defendant. Id. at 522. After discussing the matter with counsel, the Judge interviewed each juror individually in chambers. Id. Neither the defendant, defense counsel, nor the prosecutor were present for the *voir dire*. Id. Rather, a transcript was made available after the Judge completed the interviews. Id. The SJC granted a new trial. Id. at 530. The defendant and counsel were

required to be present when inquiry was made of the jury's continued ability to be impartial. Id. at 531.

In Martino, during the first day of jury deliberations, the foreperson advised that one of the jurors had an issue. Martino, 412 Mass. at 284. The Trial Judge, defense counsel, and the prosecutor discussed at length how to proceed. Id. It was settled that the Judge would examine the juror in chambers with defense counsel and the prosecutor. Id. at 285. Counsel did not request the defendant's presence. Id. The juror disclosed her grandfather had been convicted of murder. Id. The Judge excused the juror and conducted a *voir dire* of the remaining jurors to ensure they remained impartiality. Id. at 286. Satisfied, an alternate was seated and deliberations began anew. Id.

The SJC denied relief finding no error. Id. All discussion were made part of the record. Id. Counsel fully advised his client of what was transpiring and made no objection to the procedures. Id. at 287. Counsel affirmed that the defendant was in agreement and specifically declined to have the defendant's assent put on the record. Id. at 287.

In Robinson's case, the Trial Court erred in

questioning Juror 2-7 about her potential bias in chambers without defense counsel and the defendant present. See Angiulo, 415 Mass. at 531. The error is reviewed for a substantial risk of a miscarriage of justice because Counsel did not object. See Dyer, 460 Mass. at 735 n. 7. Robinson's case presents that risk.

The Judge compounded the error by failing to question the remaining jurors about the nature and extent of Juror 2-7's discussions with them and whether it influenced their ability to remain impartial. Juror 2-7 advised she shared her thoughts with other jurors. (Tr. 3-327-28). Defense counsel advised the Court he was concerned by Juror 2-7's

> inability to follow your instructions not to discuss the case, even though she didn't—she equivocated on that. But secondly, has any of that to the extent she set aside your ruling and talked, has any of the poison got into our panel now, which causes me the greatest concern. (Tr. 3-333).

Moments later, Counsel repeated his concern that "the poison may have gone beyond one person." (Tr. 3-337). The Judge responded, "it really doesn't concern me" and concluded, "I won't go any further with that. I will save your rights." (Tr. 3-333, 337).

Counsel's statements satisfied the requirements of an objection. See Commonwealth v. Federico, 40

Mass. App. Ct. 616, 618 n. 2 (1996). He urged the Trial Judge to question the panel so that the potential error could have been avoided. See Id. The Trial Judge understood Counsel wanted a *voir dire* of the remaining jurors, refused, and "saved" the defendant's rights. (Tr. 3-337).

The Trial Court's objected to refusal to question the remaining jurors in light of Juror 2-7's disclosure was not harmless beyond a reasonable doubt. Contrary to the Judges in the Martino and Angiulo cases, the Trial Judge utterly failed to question the remaining jurors about what was discussed and whether their impartiality was impaired. See Angiulo, 415 Mass. at 522; Martino, 412 Mass. at 286. In Robinson's case, the Trial Judge engaged in lengthy discussion with Counsel about Juror 2-7's bias, but did not take the next step taken by the Martino Court, individual *voir dire* of the remaining jurors to ensure impartiality. See Martino, 412 Mass. at 286.

The Trial Court's handling of Juror 1-5's issue that surfaced at the conclusion of the third day of trial added to the error. Juror 1-5 expressed concern that one of the witnesses, Ferguson, was incarcerated in the same facility as her son. (Tr. 3-556). The

Trial Judge advised the parties in chambers that the juror did not indicate her impartiality would be affected, but he did not question her. (Tr. 3-557).

The Trial Court's examination of Juror 2-7 in chambers in the defendant's absence, his refusal to question the remaining jurors, and his refusal to hold a *voir dire* of Juror 1-5; on their own, or in combination with each other as well as the Court's comments addressed in Subsection B regarding premature discussions; was error that was not harmless beyond a reasonable doubt. Rather, it created a substantial risk for a miscarriage of justice tantamount to a structural defect, for which a new trial is required.

B. THE TRIAL JUDGE DID NOT ADEQUATELY ADDRESS PREMATURE JURY DISCUSSIONS

It is a fundamental principle of law that jurors may not discuss a case prior to the conclusion of evidence, closing arguments, and final instructions. United States v. Jadlowe, 628 F.3d 1, 15 (1st Cir. 2010). It is part of a defendant's constitutional right to a fair and impartial jury. Id. at 16-7; Commonwealth v. Benjamin, 469 Mass. 770 (1976). A juror's duty of impartiality includes an obligation to receive all evidence with an open mind. See Adoption

of Tia, 73 Mass. App. Ct. 115, 122 (2008).

Premature jury discussions also violate the due process presumption of innocence. United states v. Resko, 3 F.3d 684, 689-90 (3rd Cir. 1993). Impressions formed about the evidence early on may have a significant impact on the verdict even if the jurors do not make their ultimate decision until the end of the case. Jadlowe, 628 F.3d at 18. Once a juror express his or her views in the presence of other jurors, he or she is likely to continue to adhere to that opinion and pay greater attention to evidence that comports with it. Resko, 3 F.3d at 689.

Jurors who engage in premature jury discussions may be prejudiced in their later deliberations in ways difficult to identify and quantify. Id. Premature discussions are done without the benefit of final instructions. Id. This raises the potential that jurors will have discussed evidence and witnesses through a distorted lens, thereby making the trial an unreliable forum for determining guilt or innocence. Jadlowe, 628 F.3d at 20.

In Resko, the Court was alerted during trial that jury members had been discussing the case during a recess. Resko, 3 F.3d at 687. The defendant moved for

mistrial and for a *voir dire* of the jurors. Id. at 687-88. The Judge declined, opting to send a questionnaire to each juror inquiring whether he or she discussed the case and if so whether he or she formed an opinion about the defendant's guilt. Id. at 688. The jurors all responded "yes" to the first question and "no" to the second. Id. at 688.

The Third Circuit reversed the defendant's conviction without requiring him to demonstrate prejudice. Id. at 695. There was unequivocal proof of premature discussions and an insufficient response to determine the nature of the discussions and the existence of prejudice. Id. at 695. The questionnaire was inadequate to address the concerns inherent in premature jury discussions. Id. at 691. Without an individual *voir dire*, there was no way to know the extent of the discussions, how often they occurred, and what was discussed. Id.

In Commonwealth v. Alicea, 464 Mass. 837 (2013), on the second day of trial, "a couple of" jurors were concerned one of the jurors had "made up his mind." Id. at 848. The Judge promptly reported the matter to the parties and concluded it would be inappropriate to question the juror's thought process. Id. Rather,

with the defendant's assent, the Judge reinstructed the jurors to keep an open mind and to remain objective and indifferent until the evidence closed and they received instructions. Id. A foreperson was selected to ensure compliance. Id.

The SJC denied relief. The decision pointedly to reinstruct the jury and to select a foreperson were sound exercises of discretion. Id. at 849. No further issues were reported throughout the remainder of trial. Id. at 848.

In Robinson's case, as in Resko, Juror 2-7 provided unequivocal proof of premature discussions. Resko, F.3d at 695. The Trial Judge did not conduct a *voir dire* at Counsel's urging of the remaining jurors to glean the nature and extent of Juror 2-7's discussions with fellow jurors and whether they remained impartial. See Id. at 687-88. Thus, the Court created no record of the potential harm done to Robinson's fair trial and due process rights.

Furthermore, the Court did not exercise discretion in an appropriate manner similar to the Court in Alicea. See Alicea, 464 Mass. 837. After he excused juror 2-7, the Judge did not immediately and pointedly reinstruct the jurors to keep an open mind

and to remain indifferent. See Id. at 848. To the contrary, he made the following statement at the day's end, granting license to premature discussion:

> Some information has come to me that the jury was discussing the matter. Again, I think it's very important—**not essential (emphasis added)**, but very important that you do not. Wait until you have heard the entire case. (Tr. 3-554).

The Trial Court's improper handling of jury issues created a structural defect such that the reliability of Robinson's trial to determine guilt or innocence was impaired. See Jadlowe, 628 F.3d at 20. Juror 2-7's biases had come to the forefront in her thinking. She admitted discussing her thoughts with fellow jurors. Counsel urged the Court to examine the remaining jurors, but the Judge declined. When the trial day ended, the Judge gave the jury a degree of license to discuss the case prematurely. Consequently, Robinson must receive a new trial.

III. THE TRIAL COURT ERRONEOUSLY ALLOWED INADMISSIBLE BAD CHARACTER EVIDENCE

The Court committed palpable error in admitting, over the defendant's objection, evidence of Robinson's specific acts of misconduct impermissibly showing his bad character. Helfant, 398 Mass. at 244. The commonwealth may not introduce evidence of a

defendant's criminal or wrongful conduct—bad acts—to show his bad character or propensity to commit the charged crime. Anestal, 463 Mass. at 665. Bad character evidence compels a defendant to answer for un-charged conduct, confuses his defense, diverts the jury's attention from the charges immediately before it, and prejudices a defendant by showing that he has misbehaved on other occasions. Id.

Although inadmissible to show a defendant's propensity, it may be admitted for limited purposes so long as it is relevant to a trial issue. Helfant, 398 Mass. at 224. The permitted purposes include "common scheme, pattern of operation, absence of accident or mistake, identity, intent, or motive." Id. It may also be admitted, under proper circumstances, to give context to the relationship between the parties. Commonwealth v. Leonardi, 413 Mass. 757 (1992). Even if relevant, it must be excluded if outweighed by its risk of undue prejudice, even if not substantially so. Commonwealth v. Philbrook, 475 Mass. 20, 26 (2016); Commonwealth v. Crayton, 470 Mass. 228, 249 (2014).

Admission of bad character evidence is reviewed for an abuse of discretion. Commonwealth v. Rutherford, 476 Mass. 639, 649 (2017). Anestal, 463

Mass. at 664. A court abuses its discretion if it committed clear error in weighing the relevant factors regarding admissibility. Rutherford, 476 Mass. at 649. When the defendant objects, the Court determines, "[whether] the judgment was not substantially swayed by the error." Anestal, 463 Mass. at 672.

In Anestal, the defendant, charged with murder, raised a lack of criminal responsibility defense. Id. at 658. The trial court initially ruled evidence that DSS removed the defendant's children from her custody prior to the killing would be admissible, but not the alleged reason why. Id. at 664. After defense counsel suggested in opening that the decedent blamed the defendant for the children's removal, the judge admitted evidence the children were removed because of the defendant, but continued to exclude the underlying alleged reason why. Id.

The SJC agreed with the trial court's initial handling of the evidence. Once the jury knew the children were removed because of the defendant, the underlying allegation was irrelevant and in any event prejudicial. Id. at 666. However, the trial court committed error when it allowed the prosecutor to cross-examine the defendant's expert on the underlying

allegations, reasoning that the expert arguably relied on the allegations when forming her opinion regarding the defendant's lack of responsibility. Id. at 667. However, the allegations did not inform the expert's opinion, they did not clarify or discredit the opinion, and served only to focus on the defendant's bad act which was outweighed by prejudice. Id. at 668.

In Robinson's case, the Court erred in admitting, over objection, evidence from Lent and Ellis that in the weeks preceding his death, Figueroa traveled to Fall River to obtain marijuana from Robinson. It was irrelevant character evidence that was outweighed by its prejudice. See Crayton, 470 Mass. at 249.

The evidence of the prior drug transactions was inadmissible for similar reason the allegations underlying DSS's removal of the defendant's children in Anestal was inadmissible. See Anestal, 463 Mass. at 666-68. Rose testified Robinson and Figueroa were arguing in the hours preceding the shooting. (Tr. 2-149-152). The argument, and Rose's testimony regarding the statements she overhead during the argument, sufficiently provided context and support for the commonwealth's theory, argued at closing, that the shooting was motivated by anger. (Tr. 6-931). The

alleged reason for the argument, drug sales, was therefore irrelevant and prejudicial. Compare with Id. Whether the argument was about drugs, money, politics, etc., it would not make Robinson's identity as the shooter any more or less probable.

The evidence was outweighed by its prejudice. See Crayton, 470 Mass. at 249. It is implicit in the rule against bad character evidence that its admission carries a high risk of prejudice. Anestal, 463 Mass. at 672. In Robinson's case; unlike Anestal, where the allegation for which the defendant's children were removed was documented by DSS; the evidence did not establish that the men were arguing over Figueroa's past two trips to Fall River. See Id. at 664. Rather, it was an inference the prosecutor urged the jury to make during closing, without any basis established in fact. (Tr. 6-932).

The prejudice of bad character evidence can be exacerbated by the frequency with which it is referenced. Id. In this case, the commonwealth presented three witnesses—Brantley, Ellis, and Lent—who offered evidence of Robinson's alleged drug sales. The prosecutor thereafter relied heavily on the evidence to support a propensity based closing

argument that was not based on fact. In the absence any such evidence, the prosecutor argued Robinson was a drug dealer who did not trust strangers because he feared they may be undercover police. (Tr. 6-933). The prosecutor argued Figueroa was a drug dealer for Robinson, and was traveling "regularly" to Fall River to "re-up his stash of drugs..." (Tr. 6-932-933). There was no evidence that Figueroa sold drugs for Robinson, traveled to Fall River regularly, or would replenish his supply from Robinson.

Evidence of Robinson's alleged drug sales to Figueroa in the weeks preceding his death was inadmissible bad character evidence. Its erroneous admission, and the prosecutor's heavy reliance on it at closing, require Robinson receive a new trial.

IV. THE PROSECUTOR MISSTATED THE EVIDENCE DURING HIS IMPROPER CLOSING ARGUMENT

A prosecutor's closing argument must be limited to the facts in evidence and the fair inferences to be drawn from those facts. Commonwealth v. Alvarez, 480 Mass. 299, 305 (2018). When a prosecutor's argument is not supported by the evidence, and the defendant does not object, the Court considers whether the improper argument created a substantial likelihood of

a miscarriage of justice. Rutherford, 476 Mass. at 644. The prosecutor's remarks are considered in the context of the entire argument, the trial evidence, and the judge's instructions. Commonwealth v. Mello, 420 Mass. 375, 380 (1995).

In Commonwealth v. Silva-Santiago, 453 Mass. 782 (2009), the SJC, exercising its powers of ch. 278, §33E, reversed a defendant's conviction because of the prosecutor's improper closing argument. Silva-Santiago, 453 Mass. at 805-10. The prosecutor argued two eyewitnesses at trial were first unable to identify the defendant on scene, despite seeing him, because they were scared. Id. at 806. There was no record evidence to support the argument. Id. The prosecutor also argued another eyewitness placed the defendant at the scene of the shooting immediately preceding the shooting. Id. The prosecutor was mistaken, the eyewitness did not so testify. Id. at 807.

The SJC ordered a new trial. Identification was the main issue at trial and the commonwealth's identification evidence was weak. Id. at 808. Forensic evidence did not connect the defendant to the shooting. Id. at 809. The prosecutor's error

therefore struck at the heart of the case. Id. at 808. The trial court gave no curative instructions. Id. at 806-07.

In Howard, 469 Mass. 721, the defendant claimed the prosecutor impermissibly commented on his right of silence, improperly argued bad character evidence, and misrepresented evidence. Howard, 469 Mass. at 741. Although defense counsel did not object, the SJC vacated the defendant's conviction under ch. 278, §33E, finding a substantial risk for a miscarriage of justice. Id. at 741 n. 21. The error was not fleeting, isolated, or on an insignificant matter. Id. at 749 n. 32. Rather, it permeated the closing and struck at the heart of the defense. Id.

In this case, the prosecutor argued Robinson's motive to kill was anger. (Tr. 6-931). Without supporting evidence, he argued the following:

> Figueroa was a drug dealer for Mr. Robinson. He went to Fall River to Sholanda (Brantley's) house on a regular basis to get drugs. Mike Ellis and Dan Lent tell us that. And Figueroa acted as a bodyguard for Smooth, interceding even when Smooth was being challenged by the boyfriend of a girl who he decided he wanted. (Tr. 6-932).

There was no evidence of any argued point. While there was evidence that Ellis and Lent, each on one

occasions, drove Figueroa to Fall River to receive marijuana from Robinson, there was no evidence that the two were working together. Furthermore, there was no evidence that Figueroa went to Fall River on a "regular basis to get drugs." (Tr. 6-932). Lent and Ellis provided testimony of one ride apiece. Brantley did not testify to seeing Figueroa in her apartment regularly. There was no evidence that Figueroa was Robinson's "body guard." They were referred to as friends.

The prosecutor's misstatement of evidence, considered individually or in combination with his reliance on impermissible bad character evidence to suggest Robinson's motive, created a substantial risk of a miscarriage of justice requiring a new trial.

V. ROBINSON IS ENTITLED TO RELIEF UNDER GENERAL LAWS CH. 278, §33E

The SJC affords broad review under G.L. ch. 278, §33E. Angiulo, 415 Mass. at 508. The entire case receives plenary review on the law and the facts to determine whether the verdict is consonant with justice. Howard, 469 Mass. at 747. The SJC considers issues and errors that appear in the record even if not argued by the defendant on appeal. Silva-

Santiago, 453 Mass. at 805.

The SJC will consider whether there was an error committed by defense counsel, the prosecutor, or the trial judge, and, if so, consider whether the error, in isolation or with others, was likely to have influenced the jury's conclusion. Alicea, 464 Mass. at 845; Wright, 411 Mass. at 682. The SJC may order a new trial or reduce a verdict if the verdict was contrary to law, against the weight of the evidence, or for any reason justice requires. Philbrook, 475 Mass. at 32.

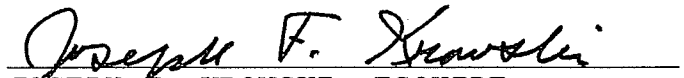
> In reviewing an appeal under G.L. c. 278, Section 33E, from a conviction of murder in the first degree, we consider each argument that a new trial or a verdict of not guilty is required because of a claimed error that is said to have created a substantial likelihood of a miscarriage of justice. We also consider generally the fairness of the verdict to see whether the verdict should be reduced or a new trial granted. Wright, 411 Mass. at 682 n. 1.

For the reasons in this brief as well as those that may appear in the record, the Defendant's conviction is not consonant with justice. Therefore, Robinson moves the Court to exercise its power and enter a required finding of not guilty due to an insufficiency of evidence. Alternatively, Robinson moves for a new trial or a reduced verdict.

CONCLUSION

For the reasons in Roman I, Robinson's conviction must be vacated and a finding of not guilty enter. For the remaining reasons, Robinson's conviction must be set aside and a new trial ordered or, pursuant to G.L. ch. 278, §33E, his verdict reduced.

By his Attorney,



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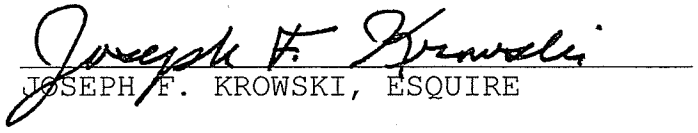
MASS. R. APP. P. 16(k)
CERTIFICATE OF COMPLIANCE

I, Joseph F. Krowski, Esquire, hereby certify that the Brief and Record Appendix of Defendant/ Appellant Charles Robinson on Appeal from His Conviction Pursuant to Mass. gen. L. ch. 278, §33E, complies with the rules of court that pertain to the filing of briefs, including, but not necessarily limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20.



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